

BEFORE THE  
ILLINOIS COMMERCE COMMISSION

IN THE MATTER OF: )  
 )  
MALIBU CONDOMINIUM ASSOCIATION )  
 )  
 v ) No. 08-0401  
 )  
COMMONWEALTH EDISON COMPANY )  
 )  
Complaint as to refund )  
overcharges/overpayments for )  
electricity with interest in )  
Chicago, Illinois. )

Chicago, Illinois  
November 4, 2010

Met pursuant to notice at 1:00 p.m.

BEFORE :

MS. CLAUDIA SAINSOT, Administrative Law Judge.

1 APPEARANCES:

2

3 GOLDIN HILL & ASSOCIATES, by  
4 MR. KENNETH G. GOLDIN  
9100 Plainfield Road  
Brookfield, Illinois 60513

5 -and-

6 LAW OFFICE OF MICHAEL A. MUNSON, by  
MR. MICHAEL A. MUNSON  
22 West Washington Street, Suite 1500  
Chicago, Illinois 60602  
7 appeared for Complainant;

8

9 EIMER STAHL KLEVORN & SOLBERG, LLP, by  
MR. SCOTT C. SOLBERG  
MS. RONIT C. BARRETT  
10 MS. KENDRA N. THOMPSON  
224 South Michigan Avenue, Suite 1100  
11 Chicago, Illinois 60604  
appeared for Respondent.

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20 SULLIVAN REPORTING COMPANY, by  
21 Teresann B. Giorgi, CSR

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I N D E X

Witnesses:

Dir.

Crx.

Re-  
dir.

Re-  
crx.

By  
Examiner

None

E X H I B I T S

APPLICANT'S

FOR IDENTIFICATION

IN EVIDENCE

1 JUDGE SAINOT: By the authority vested in  
2 me by the Illinois Commerce Commission, I now call  
3 Docket No. 08-0401. It is the matter of  
4 Malibu Condominium Association versus the  
5 Commonwealth Edison Company.

6 Will the parties present identify  
7 themselves for the record, please.

8 MR. GOLDIN: Kenneth Goldin, G-o-l-d-i-n, Goldin  
9 Hill & Associates, Counsel for Malibu Condominium,  
10 9100 Plainfield Road, Brookfield, Illinois.

11 MR. MUNSON: Michael Munson on behalf of  
12 Plaintiff Malibu, 22 West Washington Street,  
13 Suite 1500, Chicago, Illinois 60602.

14 MR. SOLBERG: Scott C. Solberg, S-o-l-b-e-r-g,  
15 from the firm of Eimer Stahl Klevorn & Solberg, on  
16 behalf of Defendant Commonwealth Edison Company.  
17 Our office is at 224 South Michigan Avenue,  
18 Suite 1100, Chicago, Illinois 60604.

19 MS. BARRETT: Ronit Barrett, also on behalf of  
20 Defendant Commonwealth Edison Company, at the same  
21 address as Mr. Solberg.

22 MS. THOMPSON: Kendra Thompson, also on behalf

1 of Commonwealth Edison Company, at the same address  
2 as Mr. Solberg.

3 JUDGE SAINSOT: Okay. I have before me  
4 Commonwealth Edison Company renewed motion in limine  
5 regarding Malibu's witness, Jose Lozano, and I have  
6 some questions, just generally.

7 I can't remember off the top of my  
8 head if there are viable claims still at issue that  
9 don't involve Rider CABA or other condominium  
10 association-related rates.

11 MR. GOLDIN: Yes, there's 13 separate causes of  
12 action. Some of them relate to the tariffs and some  
13 of them relate to other violations of the Public  
14 Utility Act, which is 103.1.

15 JUDGE SAINSOT: But are there -- it seems to me,  
16 in a very simple way, you have some allegations that  
17 originated before the condominium laws changed. And  
18 then there are some allegations -- and those are all  
19 rate claims. And then you have some allegations  
20 that have to do with the condominium association  
21 type, like 103. -- whatever it is --

22 MR. GOLDIN: 103.1.

1 JUDGE SAINSOT: Right -- and Rider CABA.

2 Do we have some non-condominium  
3 association rate cases that fall in a timely manner  
4 within the statute of limitations?

5 MR. GOLDIN: We believe that we do. We believe  
6 that only the claims that can be construed under  
7 Section 9.252 will be time barred.

8 JUDGE SAINSOT: But what other claims --

9 MR. GOLDIN: In substance -- I guess if I'm  
10 answering it in a different way -- in substance, all  
11 of our complaints seeks reparations for the period  
12 after November 22nd of 1999.

13 JUDGE SAINSOT: Okay. And there are some rate  
14 changes.

15 MR. GOLDIN: Yes.

16 MR. SOLBERG: Your Honor, I think the rate  
17 change that took place was in 1999.

18 MR. GOLDIN: Correct.

19 MR. SOLBERG: And it's Plaintiff's theory that  
20 had they not been changed they would not have been  
21 overcharged during the relevant period that's not  
22 time barred.

1 JUDGE SAINSOT: Right.

2 MR. SOLBERG: I think the interim order makes  
3 clear that their entire case is for a refund of  
4 overcharges. And it's, in essence, a claim under  
5 9.252.

6 JUDGE SAINSOT: Okay. And don't forget, I had  
7 the other case that's similar to this. So I want to  
8 make sure that I'm not confusing Malibu with  
9 King's Walk, because they're very similar.

10 Okay. In the motion in limine ComEd  
11 said, essentially, that its practices and procedures  
12 from '75 to -- 1975 to 1988 and those -- so we're  
13 clear, that is a particular time period that  
14 Mr. Lozano held certain positions at ComEd, are not  
15 relevant to ComEd's practices and procedures in  
16 1999.

17 I'm curious to see what Malibu says  
18 about that.

19 MR. GOLDIN: Your Honor, this matter has already  
20 been argued. These are the same points that they  
21 raised in the earlier motion in limine which was  
22 summarily denied. The legal standard is, does

1 Mr. Lozano know more about rates, utility policies  
2 and practices and tariffs than a layperson does so  
3 he's an expert witness, he clearly does. He's one  
4 of their senior people and he's worked there for 30  
5 years. He worked there, actually, from 1972 through  
6 2002. And thereafter, from 2002 to 2007 he was a  
7 contractor, which contractor was also providing  
8 services to ComEd. So he was involved throughout  
9 the time in controversy here, up until, I believe,  
10 2008.

11 I understand that they're unhappy  
12 about the substance of his testimony, but, again,  
13 that's for the Fact-Finder to determine its veracity  
14 and its weight, its credibility. This is a bench  
15 trial. There's no incompetent matters. We're not  
16 suggesting that anything that he's going to testify  
17 to is irrelevant or inflammatory.

18 We've already been through this. This  
19 has already been heard and argued and ruled upon.

20 JUDGE SAINSOT: Any comment?

21 MR. SOLBERG: Your Honor, if I could respond to  
22 that.



1                   You know, the motion was brought, I  
2 think, in September -- or brought before you in  
3 September. And it was not all heard and ruled upon.  
4 At that point in time it was not at all clear what  
5 his qualifications were. At that point in time they  
6 had produced no report or any other document which  
7 would give us any inkling of what sorts of opinions  
8 he was going to provide. And I think your Honor  
9 said, Take a deposition. Let's find out what his  
10 qualifications are and what his opinions are. And  
11 that's what we did two days ago.

12                   And it was clear from that deposition,  
13 your Honor, that with respect to things like  
14 Rider CABA and calculation of any refund that would  
15 be due under Rider CABA, Mr. Lozano, whose  
16 experience in the marketing group and his  
17 experience -- direct experience with rates and  
18 tariffs ended in 1988, had no idea about Rider CABA.  
19 The first time he had heard of it or looked at it --  
20 I should say, looked at it, was a little over two  
21 weeks ago. And as he sat in his deposition  
22 yesterday, you've read the transcript, he made clear

1 that he had never seen the Rider CABA calculation  
2 that had been provided for these people and he had  
3 no opinion on it.

4                   And so, the notion that he's somehow  
5 qualified to testify about Rider CABA calculations  
6 that took effect in 2007, based on his experience  
7 from two decades earlier, is simply wrong.

8                   The same goes with Section 16.301 of  
9 the Public Utilities Act. When you look at the  
10 witness designation that the Plaintiffs have  
11 supplied to us and to the Court, it specifically  
12 lists him as an expert to give opinions on  
13 Rider CABA and that section of the Public Utilities  
14 Act.

15                   At his deposition two days ago, he  
16 said he had never seen that provision of the Act.  
17 Now how that equates to expertise is, frankly,  
18 beyond me, your Honor.

19           JUDGE SAINSOT: I do note for the record that  
20 ComEd is not asking to bar Mr. Lozano, they're  
21 asking to limit his testimony.

22           MR. GOLDIN: Your Honor, I don't believe that

1 there's an expert in the world on Rider CABA or  
2 16.103.1. If you actually shepardize the case, the  
3 only thing that comes up that discusses these are  
4 the cases that we're involved with with ComEd.

5                   Mr. Lozano is expert at the  
6 application and selection of tariffs. If we brought  
7 in a college professor, who deals with ratemaking,  
8 he would not have that direct experience with  
9 Rider CABA, either. I don't know of anybody,  
10 except, perhaps, somebody in the legislature that  
11 does. We do not hold him out to be an expert on  
12 Rider CABA or Section 103.1, which is, of course, a  
13 longstanding provision of the Utility Act, but  
14 rather he has more experience and more familiarity  
15 with the application, selection and the policies  
16 incident to tariffs and riders than a layperson.  
17 And, frankly, I think he knows more about it than  
18 the current people -- the people who are currently  
19 at ComEd in this present case.

20                   His credentials, I think, are as  
21 unsalable for something like this as you can find.

22       JUDGE SAINSOT: Well --

1           MR. GOLDIN: I'm not -- I apologize.

2                       But, you know, Malibu neither has the  
3 resources nor the duty to attempt to uncover under a  
4 rock somebody who might have been involved with  
5 drafting Rider CABA.

6           MR. SOLBERG: Your Honor, if I could.

7                       The way our motion is presented and  
8 the way I think it should be thought of is, there's  
9 really two different things that he's being  
10 presented to testify to.

11                      The first is is the calculation of the  
12 refunds that they think they're entitled to. And  
13 that's both the refund for this period from June 24,  
14 '06 to July -- or January 2nd of '07, which is the  
15 period that they're complaining about in their  
16 complaint.

17                      And in that respect, he -- we provided  
18 him with a spreadsheet at his deposition, that had  
19 been provided to us, and we asked him questions  
20 about the spreadsheet. And he really hadn't done  
21 any independent analysis of the spreadsheet, but he  
22 said he understood it had been prepared by, I

1 believe, Marshall Shifrin, and that he agreed with  
2 it, generally. Okay.

3                   So for that 6-month time period that's  
4 really in dispute in this case, we actually don't  
5 have a problem with this spreadsheet because it  
6 calculates the amount of their rate differential,  
7 which would be the refund, to be around \$5,500 and  
8 that's what our own people calculate. There's no  
9 material difference. So on this, whether he's an  
10 expert on this spreadsheet or not, we don't really  
11 care, we can stipulate to it. Okay.

12                   Now, the difference becomes -- and if  
13 it ended there, which it should end there, because  
14 again their complaint limits itself explicitly to a  
15 refund ending in January 1 -- or January 2, 2007.  
16 So if that's what the case was about, the parties  
17 can, frankly, stipulate to what the amount of the  
18 overcharge was. But they have instead, at some  
19 point in time with their discovery, they gave us one  
20 piece of paper, which is known as Exhibit A, and  
21 it's at Tab 6 of the motion, your Honor, and in  
22 Exhibit A it purports to calculate damages --

1 JUDGE SAINSOT: Damages?

2 MR. SOLBERG: -- well, it really is damages and  
3 I'll explain why in a moment, your Honor.

4 But it purports to calculate amounts  
5 owed after January of 2007.

6 JUDGE SAINSOT: Well, that's not necessarily  
7 damages.

8 MR. SOLBERG: Well, let's talk -- we'll talk  
9 about that in a second -- I'll address that now, if  
10 you'd like.

11 I mean, the big point with Mr. Lozano  
12 is, he had never -- he had no opinion on this  
13 whatsoever. When we asked him certain questions --  
14 when you look at No. 3 on the sheet of Tab 6, the  
15 rate cross difference between the commercial rate  
16 and the residential rate with space heating -- and  
17 then it goes -- it goes 49 months from 6-13-06  
18 through 7-13-2010. Okay. When we asked him whether  
19 or not the kilowatt hour number there was an  
20 average, he said he didn't know. But the bizarre  
21 thing that occurred in response to that question, is  
22 that Counsel for Plaintiffs objected and they said,

1 He didn't prepare this. He doesn't know anything  
2 about it. It's right for him to opine on it.  
3 That's exactly our point, your Honor. It's not  
4 right for him to opine on this.

5                   We got this document. We immediately  
6 asked for information -- to give us some information  
7 about the methodology, the source of these numbers  
8 and we got nothing. Finally, we get their expert,  
9 their proffered expert. And when we ask him  
10 questions about this document, he has absolutely no  
11 opinion.

12       JUDGE SAINSOT: Where did the document come  
13 from?

14       MR. SOLBERG: It's a great question.

15       MR. GOLDIN: Are you asking me, your Honor?

16       JUDGE SAINSOT: Well, I don't know --

17       MR. SOLBERG: Plaintiff provided it to us with  
18 their discovery responses, your Honor.

19                   Now, your Honor, if I could address  
20 the damages issue.

21       JUDGE SAINSOT: Please.

22       MR. SOLBERG: When you look at this, it

1 starts -- they've got this calculation from 6-13-06  
2 through 7-13-2010. Now, your Honor, we actually  
3 had -- and it purports to say, what, close to  
4 \$60,000 a year that they claim is the overcharge.  
5 Your Honor, when you look at the actual data of the  
6 rate charged versus Rate 14 for that last 6-month  
7 period in '06, the period that's truly in dispute in  
8 this case, the actual amount of the rate  
9 differential is \$5,524 and change. We know the  
10 actual rates during that period and it's an easy  
11 calculation that their people did and our people did  
12 and it came to roughly the same answer.

13 JUDGE SAINSOT: I don't know how you would even  
14 calculate damages.

15 MR. SOLBERG: During the rest of this period,  
16 your Honor, for 32 of these 49 months that are  
17 listed here, Malibu did not purchase from ComEd.

18 JUDGE SAINSOT: I saw that in the motion.

19 MR. SOLBERG: ComEd did not charge them for  
20 electricity supplied during that period and,  
21 therefore, they didn't overcharge them and,  
22 therefore, there could be no refund of an



1 overcharge.

2 JUDGE SAINSOT: Well, well, hold on. I suppose  
3 it's possible that the other -- I mean, I agree with  
4 you that if they use an alternative electric  
5 supplier that ComEd could not overcharge them for  
6 electric supply, but there could be a miscalculation  
7 of the taxes or all the miscellaneous other little  
8 charges or the delivery service.

9 MR. SOLBERG: The delivery service -- I don't  
10 understand them to be complaining that the delivery  
11 charge was wrong, your Honor. I don't understand  
12 them to be complaining that \$60,000 a year of  
13 incorrect delivery charge --

14 JUDGE SAINSOT: Well, what is that anyway?

15 MR. MUNSON: Well, let me try because I'm not  
16 sure that that was a correct recitation. Keep in  
17 mind that at core this is -- and we feel it will be  
18 proven out at trial, this is a residential customer,  
19 always has been, subject to the Condominium Property  
20 Act. It's properly on a residential space-heating,  
21 multifamily rate, was switched inappropriately by  
22 ComEd. And reparations, is what the complaint

1 complained for, after that time that are continuing  
2 till now. They have energy using (sic) in their  
3 common area that they're using now. They're still  
4 not on a residential rate. They're still classified  
5 as commercial rate. Having somebody do the  
6 calculations based on the usage data, you don't need  
7 a Phi Beta Kappa from Harvard, you need somebody  
8 who's familiar with ComEd's practices, policies and  
9 can read a tariff and apply the calculations of  
10 Rider CABA or any of the rates and riders.  
11 Otherwise, you know, people would have to continue  
12 to be involved with the utility even today. The  
13 rates are changing even as we speak.

14                   To the point that it's only to 2007,  
15 you know, perhaps an amendment of the complaint is  
16 appropriate, but we read it a little differently and  
17 it's not -- Malibu is not just seeking damages from  
18 those 6 months in '06, but because of ComEd's  
19 inappropriate, unilateral switch, the harm continues  
20 through today.

21       MR. SOLBERG: Your Honor, if I could address --  
22 there are three different things there.

1                   First, as of today they're still  
2 buying from Suez, an alternative supplier. They are  
3 not buying from ComEd. That's number one.

4                   Number two. Mr. Munson tries to brush  
5 aside the actual allegations of the complaint. When  
6 they filed their initial informal complaint, there  
7 was a reference in the informal complaint about  
8 still being charged the wrong rate today. Okay.  
9 That was filed in, I believe, '07. They amended  
10 their complaint after counsel became involved and  
11 they had lawyers. They amended their complaint in  
12 February of 2009, long after they had stopped buying  
13 from ComEd, for the first Suez period.

14                  And in that amended complaint, which  
15 is the operative complaint before us today, it says,  
16 no fewer than 17 times, that they're seeking  
17 reparations in the form of a refund, ending  
18 January 2, 2007.

19       MR. GOLDIN: Never said that.

20       MR. SOLBERG: And when --

21       MR. GOLDIN: I'm sorry. Go ahead.

22       MR. SOLBERG: It's attached here, your Honor,

1 and we cite -- in our footnote we cite to all the  
2 paragraphs. Nowhere in that complaint, nowhere, if  
3 you search it from the beginning to the end, do they  
4 allege that these damages are continuing after  
5 January 2.

6                   Now when we got their calculation,  
7 this is the big spreadsheet again, your Honor, it  
8 ends -- their calculation of the amount of the  
9 overcharge ends on January 2. Okay. So that's the  
10 case that has been before us. And the reason --  
11 there's a lot of good reasons why they wouldn't seek  
12 damages after that date, the first of which is what  
13 I've already explained, for most of this period they  
14 haven't been buying from ComEd, number one.

15                   And, secondly, for the first 6 months  
16 of 2007, after the rates had been restructured,  
17 there was no difference between the residential rate  
18 and the commercial rate. There's absolutely no  
19 delta, no difference, no charge.

20                   So if you took the 12-year period, if  
21 you want to go back to this Exhibit A where they  
22 calculate \$60,000 every 12 months is damage, if you

1 take the last 6 months of '06, there's a \$5,000  
2 price difference. The first 6 months of '07, zero  
3 price difference.

4                   So if this -- again, we tried to  
5 reconstruct this. We have -- ComEd has some very  
6 smart people trying to look at these numbers to  
7 figure out where they came from. And their expert,  
8 Mr. Lozano, the most he could say is it came from  
9 the spreadsheet, he thought. Right?

10                   And so we tried to reconstruct this to  
11 come up with this number of kilowatt hours and the  
12 3 and a half cents rate difference that they have on  
13 here that they simply multiply out over  
14 49 months. We cannot reconstruct it. And that's  
15 why we asked for the supporting data. That's why we  
16 wanted a witness so that we could cross-examine him  
17 about it. And they gave us their witness,  
18 Mr. Lozano, and he had no opinion whatsoever. And  
19 when we started to ask him questions about the  
20 specifics, whether it was an average, whether it was  
21 based on actual costs, Counsel objected and said he  
22 had no opinion on it.

1                   So we're here 2 days before -- it's on  
2 Pages 95 and 96 of the transcript, your Honor. So  
3 we're here today, 2 days -- 2 business days before  
4 this hearing, we have no witness to cross-examine  
5 about this document. And, frankly, at this point,  
6 as I think Counsel made the point, this has been  
7 around since '08, if they hadn't plead the case  
8 properly and they don't have someone to submit this  
9 testimony in an admissible form that we can  
10 cross-examine, then Mr. Lozano should be precluded  
11 from testifying about it. He's clearly not an  
12 expert. And the exhibit and the calculation should  
13 be excluded.

14                   And that's the nature of our motion,  
15 your Honor. It's fundamental fairness.

16       JUDGE SAINSOT: Now I have to say that I've been  
17 looking over the amended complaint and Mr. Solberg  
18 is correct about the January 2, 2007 date. Count  
19 after count, it's from blah-blah-blah date to  
20 January 2, 2007. I think -- I don't know what you  
21 want to do about that and maybe you want to talk  
22 amongst yourselves. Technically, you can amend the

1 complaint, I suppose, but -- I don't know what kind  
2 of evidence. I don't know if Mr. Solberg would want  
3 a continuance. I don't know -- that could be  
4 complicated or it could be simple.

5 MR. GOLDIN: If I may, your Honor.

6 There's several components in Malibu's  
7 complaint to the damages that we seek.

8 One, which is absolutely -- I think  
9 absolutely explicit from the complaint, are these  
10 overcharges for the period from 1999 to January of  
11 2007.

12 The other reason is the Rider CABA  
13 credits, which is proactive and is not limited  
14 within the complaint. I can refer you to a specific  
15 cause of action.

16 JUDGE SAINSOT: Oh, yeah. Okay. Maybe I didn't  
17 get that far.

18 MR. GOLDIN: Count 10.

19 There are additional counts that  
20 aren't time limited that relate to 103.1, which  
21 basically says that ComEd should have provided all  
22 electric discounts.

1 JUDGE SAINSOT: He's right.

2 MR. GOLDIN: The crux of what I believe your  
3 authority is, your Honor, the Commission's  
4 authority, and what Malibu is seeking reparation  
5 for, we're saying is that had this wrong not  
6 occurred with the rate switch, Malibu shouldn't be  
7 placed into the position that they should have had  
8 the wrong not occurred.

9 The fact that we took energy from Suez  
10 and subsequently took energy as a commercial rate,  
11 is all a direct consequence of the fact that we were  
12 taken off, without our knowledge or consent, from  
13 the residential.

14 JUDGE SAINSOT: Okay. So what -- are you saying  
15 that because you were switched and because you were  
16 on a commercial rate, that had an impact on what  
17 went on with you and Suez?

18 MR. GOLDIN: Yes, your Honor.

19 MR. MUNSON: And Suez wasn't the whole period.  
20 There was a 1-year period in that time -- as a  
21 matter of fact, when the complaint was filed, that  
22 Malibu switched back to ComEd service, onto the



1 commercial service, not the residential service, in  
2 those years.

3                   It's interesting, also, that they've  
4 had calculations performed and we haven't seen any  
5 of it to date from their -- we haven't been provided  
6 any of that in discovery or anything.

7       MR. SOLBERG: That's easy. They haven't  
8 requested it. We offered to exchange documents  
9 yesterday and they never got back to us.

10       MR. GOLDIN: Excuse me. Ms. Barrett this  
11 morning acknowledged that we had requested it and  
12 she was going to provide it, is that correct?

13       MS. BARRETT: No, I did not acknowledge that  
14 and --

15       JUDGE SAINSOT: No, we're not going to go down  
16 the --

17       MR. SOLBERG: We'll give them our calculations,  
18 your Honor, that's easy.

19                   And it's true that for a 1-year  
20 period, from July 28, '08 to July 28, '09, they were  
21 purchasing from ComEd. However, this notion that  
22 ComEd's failure to give them the right rate caused

1 them to go to Suez -- if you want to -- and that's  
2 injury, somehow that's injury to them? Calculation  
3 of that injury is a calculation of damage and that's  
4 beyond the jurisdiction --

5 JUDGE SAINSOT: Well, here's how I interpret  
6 what Mr. Goldin said. It didn't cause them to go to  
7 another -- I would agree with you, if that's what I  
8 heard Mr. Goldin say. What I heard him say is  
9 because he was on a -- because Malibu was on a  
10 commercial rate, he had to take from Suez based  
11 on -- or not he, Malibu had to take from Suez based  
12 on a commercial rate.

13 Now I'm not saying they can prove  
14 that. I don't know. But I think that's what  
15 they're saying is that they weren't eligible for  
16 residential.

17 MR. SOLBERG: To the extent that caused them to  
18 suffer injury, your Honor, that's not in a nature of  
19 a refund of an overcharge or a reparation. It truly  
20 is in the nature of --

21 JUDGE SAINSOT: That could be. That could be.

22 MR. SOLBERG: And we've never -- we've asked for

1 what the rate they're paying to Suez and I think it  
2 was embedded in something for the first time that  
3 they went out -- but they're currently at Suez,  
4 they've been there since July '09, and they've given  
5 us absolutely nothing about what they've been  
6 paying.

7                   And that's why I say, when you look at  
8 this calculation, that's at Tab 6, it's not based on  
9 real rates. It doesn't appear to be based on what  
10 they're paying to Suez. It doesn't appear to be  
11 based on their actual usage. And the number is  
12 fictitious. And, again, we have no one, absolutely  
13 no one who can -- we can cross-examine about it.

14       JUDGE SAINSOT: Well, it's just discovery. That  
15 doesn't mean it's going to be admitted into  
16 evidence.

17       MR. SOLBERG: True, but -- apparently, if I  
18 understood correctly, Counsel made it up. So how  
19 does --

20       JUDGE SAINSOT: Oh, I don't know. I don't see  
21 lawyers going around doing a lot of math. We avoid  
22 that.

1       MR. SOLBERG: Well, if you look at it, your  
2 Honor, the math is awfully simple. The question  
3 is --

4       JUDGE SAINSOT: Oh, I don't know. It's probably  
5 beyond my scope, so let's not go there.

6       MR. SOLBERG: But, your Honor, the other point  
7 was -- that Mr. Goldin made, that they do have a  
8 claim for Rider CABA. We acknowledge that.

9               And in our motion, part of it is  
10 addressed to Mr. Lozano's qualifications to testify  
11 about that Rider CABA calculation.

12       JUDGE SAINSOT: Okay. I forgot. I wanted to  
13 say this. Okay.

14               I think we can all agree without  
15 having a motion to bar or anything, it's on the  
16 record, you can flash it in my face, if you need be,  
17 but I doubt -- we can all agree that  
18 Mr. Lozano is not an expert on CABA, 103.1 or  
19 anything else.

20               We can all agree?

21       MR. MUNSON: But he's not a lawyer.

22       MR. GOLDIN: We can agree that he's not a lawyer

1 and didn't participate in --

2 JUDGE SAINSOT: But he also is not an expert on  
3 those 2 kinds of rates.

4 MR. GOLDIN: Again, I hate to be argumentative  
5 all evidence to the contrary, but he knows more  
6 about how to apply a generic ComEd rate than any  
7 layperson --

8 JUDGE SAINSOT: Right.

9 MR. GOLDIN: -- as a matter of law that makes  
10 him an expert.

11 JUDGE SAINSOT: Right. And I don't disagree  
12 with that.

13 MR. SOLBERG: 2 days before the trial we asked  
14 him how this calculation came about for their  
15 Rider CABA, where they use an 18-month period and  
16 things that aren't in the Rider, whatsoever, he  
17 couldn't answer it. And when we started to press  
18 about this, Counsel objected and said he couldn't  
19 opine about it.

20 JUDGE SAINSOT: Well, that doesn't make him an  
21 nonexpert. That makes it a bad -- it makes it  
22 something that's probably not going to get into

1 evidence, frankly, you know.

2 I understand where you're coming from  
3 about that document, but, you know --

4 MR. SOLBERG: I guess if he shows up Tuesday and  
5 suddenly he understands everything about this  
6 calculation, at that point I think we have been  
7 severely prejudiced, your Honor.

8 JUDGE SAINSBOT: Right. Depending on the  
9 circumstance.

10 MR. GOLDIN: Your Honor, I disagree. Mr. Lozano  
11 is not obligated to prepare and complete his  
12 analysis and stated many times in his deposition  
13 that he hadn't completed his calculations or looked  
14 at certain things. ComEd was given, I think,  
15 exceptional leniency getting to the bulk in the  
16 first place

17 Mr. Solberg seems to suggest that at a  
18 discovery deposition he has to be on their schedule  
19 and complete the work that they expect to be  
20 complete and being subject to being cross-examined,  
21 that's not what a discovery deposition is. It's to  
22 ascertain and to get truthful answers to their

1 questions.

2 MR. SOLBERG: Your Honor, this is games-playing.  
3 When we were here in September, we moved to preclude  
4 him from testifying. You allowed us to take this  
5 deposition. The clear purpose of that was to  
6 explore his qualifications and to explore what his  
7 opinions were. And they show up a week before the  
8 hearing and he has no opinions.

9 Here was another funny exchange, and I  
10 don't have the pin cite to the transcript, maybe  
11 your Honor saw it.

12 At some point Ms. Thompson asked, Do  
13 you have -- have you formulated an opinion, a final  
14 opinion?

15 No.

16 Do you have any idea when you're going  
17 to have a final opinion?

18 Object, calls for speculation.

19 That's what Counsel said.

20 Asking him when he was going to have a  
21 final opinion called for speculation.

22 MR. GOLDIN: I didn't --

1           MR. SOLBERG:  It's in the transcript.

2                       This is games-playing, your Honor.

3                       They're going to show up on Tuesday  
4 and they're going to prop him up.  He should have  
5 been prepared for this deposition.  If that's the  
6 case, then we ought to be compensated for the  
7 deposition because it was a complete and utter waste  
8 of time.

9           JUDGE SAINOT:  Well, here's the -- Page 95 that  
10 Mr. Solberg directed me to earlier.

11                      And according to Page 95, Mr. Goldin  
12 says, You're asking him to opine -- and for the  
13 record, this is Page 95 of the Lozano dep.

14                      You're asking him to opine on  
15 something he didn't create.  You already said he  
16 didn't create this.

17                      So I don't know how you're going to  
18 get that into evidence, but at this time I think the  
19 problem is evidentiary foundation.  And I'll leave  
20 it at that.

21           MR. GOLDIN:  The document that he was asked to  
22 opine on is a set of mathematical calculations.



1 JUDGE SAINSOT: Well, but you still have to --  
2 there's still evidentiary foundation issues with  
3 mathematical, you know, foundation. That's all I'm  
4 saying.

5 MR. GOLDIN: We understand the foundation --

6 MR. SOLBERG: We're entitled to know where those  
7 numbers came from, your Honor.

8 We're literally here a couple days  
9 before this hearing and this document is a complete  
10 mystery. Is it actually used? Is it averages?  
11 Where do these numbers come from?

12 JUDGE SAINSOT: Well, I think the best thing to  
13 do about that is give you 5 minutes to talk about  
14 where those numbers came from by yourselves. I  
15 don't think you need to drag me into this at that  
16 point.

17 MR. SOLBERG: Well, I guess that's the basis for  
18 the motion, your Honor, that they have no one who  
19 can -- they've presented no one to us, including the  
20 expert that they said was going to opine on these  
21 issues. The expert that they gave us, that they  
22 told you was going to opine on these issues, has no

1 foundational basis to give any opinion as of 2 days  
2 ago.

3                   And so, again, if they show up and  
4 he's all of a sudden testifying to this, I think  
5 that is highly prejudicial, your Honor.

6       MR. GOLDIN: Disagree. Again, he is applying,  
7 giving data and numbers and he has the expertise to  
8 do so.

9       JUDGE SAINSOT: Well, what about what  
10 Mr. Solberg said about your expert not having any  
11 expert opinion, that could be a problem.

12       MR. GOLDIN: He did not say he had no expert  
13 opinion. If you want to cite to the transcript, he  
14 was asked about one discrete issue and he said he  
15 had not formulated an opinion. And I believe it was  
16 an issue relating to Rider CABA, which he hasn't  
17 completed his review yet. In large, he was asked  
18 hundreds of questions, he expressed strong and  
19 decisive opinions on 98 percent them. And certain  
20 ones he hadn't formulated an opinion and he  
21 candidly, honestly said, I haven't formulated an  
22 opinion, yet.

1 JUDGE SAINSOT: I have to also say that there  
2 were a lot of questions that had nothing to do with  
3 that line of questions, basically, asking his  
4 background, which is fine, you know.

5 I'm just pointing that out that when I  
6 read the deposition, and didn't memorize it, but  
7 there were a lot of questions about his background.

8 MR. SOLBERG: Well, his background was the only  
9 basis for his purported expertise, your Honor.

10 And, again, his expertise -- his  
11 experience in rates and tariffs, again, ended in  
12 1988, 11 years before this switch. He had virtually  
13 no knowledge about open access and the various --  
14 the issues that were alive and well and at the  
15 center of the policies and practices of ComEd in  
16 1999, when the switch occurred, he had no knowledge  
17 of that.

18 JUDGE SAINSOT: Well, I -- you can point that  
19 out at trial.

20 MR. SOLBERG: Yes.

21 JUDGE SAINSOT: But if you look at the  
22 deposition -- I mean, I was taking notes while I was

1 reading it -- on Page 20 he's familiar with Rate 1  
2 and Rate 6. On Page 25 -- no, 25 is not -- on  
3 Page 22 he's familiar with Rate 14, and there were  
4 other ones.

5 MR. SOLBERG: True.

6 JUDGE SAINSOT: So he has some background on the  
7 original switch kind of problem information.

8 I think you're right about the CABA  
9 and all those things, but that's different. So  
10 we're just going to -- you'll probably have to make  
11 an objection here to establish a good record.

12 But I think I'm going to deny your  
13 motion in limine with the caveats that I've set  
14 forth earlier.

15 Anything else?

16 MR. GOLDIN: Can we take a minute break?

17 JUDGE SAINSOT: Yeah. I think you probably  
18 should talk amongst yourselves about the issues that  
19 your -- what time is it, 2:00 o'clock? 5 minutes?

20 MR. GOLDIN: Sure. That's fine.

21 MR. SOLBERG: Thank you.

22

1 (Whereupon, a discussion  
2 was had off the record.)

3 JUDGE SAINSOT: We've agreed to move the trial  
4 dates, which were originally set for November 9th  
5 and November 10th, which is next week, to  
6 February 23rd and February 24th, 2011, at 10:00 a.m.  
7 with a status hearing on February 18th at 11:00 a.m.

8 Is there anything I should add or  
9 change?

10 MS. BARRETT: Just one caveat. I just realized  
11 that we will need to check with our witnesses and  
12 make sure they're available on those dates.

13 JUDGE SAINSOT: Okay. If not, a group e-mail or  
14 a group phone call should take care of that issue.

15 All right, thanks. Have a good  
16 afternoon.

17 (Whereupon, the above-entitled  
18 matter was continued to  
19 February 18, 2011, at 10:00.)  
20  
21  
22